

H.R. 4167 FACTS

THE “IMMINENT HAZARD” PROVISION FAILS TO ENSURE STATES CAN RESPOND TO EMERGENCIES

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State food safety officials have repeatedly warned that H.R. 4167 would paralyze the states' ability to respond to terrorist threats to the food supply. According to the Association of Food and Drug Officials (AFDO), H.R. 4167 would “handcuff the first responders who deal with food safety issues every day.” States are increasingly realizing that the bill will preempt critical state and local food safety and defense programs, hindering their ability to protect their citizens.

The Association of Food and Drug Officials has stated:

Passage of this bill will undermine proven consumer protection programs. The preemption provisions contained in H.R. 4167 are broad, vague and sweeping and will likely dismantle the authority of state and local laws that address adulterated foodWhen you consider that local and state food safety programs are our first line of defense against acts of terrorism involving the food supply, AFDO respectfully suggests that now is not the time to dismantle our national food protection program that maintains one of the safest food supplies in the world.¹

In a December 8, 2005 letter to the Energy and Commerce Committee, the National Association of State Departments of Agriculture (NASDA) tells us:

As you know, the current food safety regulatory system in the United States is the shared responsibility of local, state and federal partners. Approximately 80% of food safety inspections in the nation are completed at state and local levels. Therefore, it is imperative that states have the right to act quickly to enact laws that address local and statewide public health concerns that cannot be anticipated or are not adequately addressed nationally. NASDA believes that the existing food safety system forms the first line of defense against the growing threat of a terrorist attack against our nation's food supply. The preemption of state and local food safety programs would leave a critical gap in the safety net that protects consumers.²

Individual states have reached the same conclusions. The New York Agriculture Department has found that under this legislation “New York could be left without

¹ Letter from Marion Aller, President, Association of Food and Drug Officials, to Rep. Henry A. Waxman (Dec. 5, 2005).

² Letter from J. Carlton Courter III, President, National Association of State Departments of Agriculture, to Members of the House Energy and Commerce Committee (December 8, 2005).

any means to keep contaminated food from entering the nation's food supply."³ Florida has stated that this legislation would make it more difficult to "mitigate the effects of an intentional bioterrorist agent food adulteration."⁴ In opposing the legislation, Georgia has stated that "now is not the time to cut back on our food safety and security when almost every day we hear talk of possible terrorist attacks on our agriculture and food supply network."⁵

In fact, H.R. 4167 would undermine the state's abilities to prepare against and respond to a bioterrorist attack in several ways.

H.R. 4167 WILL REMOVE TRADITIONAL STATE AUTHORITY TO MAINTAIN FOOD SAFETY SYSTEMS THAT CAN RESPOND TO EMERGENCIES

H.R. 4167 would preempt state food safety laws that are not identical to federal laws. If a state's authority to prepare for or respond to an emergency differs, the state would have to seek FDA's permission to maintain it through a petition process. In addition to the shift in state resources from actually protecting public health to petitioning the federal government for permission to maintain the authority to do so, this process is unlikely to yield satisfactory results. The Congressional Budget Office has determined that FDA will likely lack the resources to review petitions in a manner that will comply with the timeframes of the Act.⁶ 39 Attorneys General have stated that this process will be "slow, expensive, and uncertain, and certainly is no substitute for allowing states their traditional role of taking action on their own to protect consumers."⁷ The Attorneys General state that:

The bill would create a new federal bureaucracy dedicated to evaluating, judging and even invalidating proposed state and local laws, a startling change in state-federal relations in the food safety area.

States have begun to identify specific authorities that will be preempted in this area, such as Florida's "stop-sale" authority.⁸

³ Letter from Patrick H. Brennan, Commissioner, State of New York Department of Agriculture and Markets, to Members of the New York Delegation (March 1, 2006) (available online at: http://www.house.gov/waxman/pdfs/food_safety_ny_agr.pdf).

⁴ Letter from Charles H. Bronson, Commissioner of Agriculture, Florida Department of Agriculture and Consumer Services, to Rep. Tom Feeney (February 14, 2006).

⁵ Letter from Tommy Irvin, Commissioner, Georgia Department of Agriculture, to Rep. Jack Kingston (February 7, 2006).

⁶ Congressional Budget Office, *Cost Estimate H.R. 4167: National Uniformity for Food Act of 2005* (February 27, 2006).

⁷ Letter from the National Association of Attorneys General, to Members of Congress (March 1, 2006).

⁸ Office of Rep. Waxman, *The Scope of H.R. 4167 Is Broader than Advertised* (Mar. 6, 2006).

H.R. 4167 REMOVES STATE AUTHORITY TO RESPOND QUICKLY – OR PERHAPS AT ALL – TO AN EMERGENCY

Proponents of H.R. 4167 point to an “imminent hazard” provision in the legislation as providing all necessary authority for state and local governments to respond to terrorist attack. However, this provision severely limits the authority of states, and may act to actually further limit state action.

The “imminent hazard” provision authorizes states to “establish a requirement” after undergoing a new federal procedure. First, the state is required to consult with the Secretary of Health and Human Services to determine whether the federal government is going to take action.⁹ The legislation provides that if the federal government is taking enforcement steps on a particular issue, states may not address the imminent hazard. This bizarre, restrictive language only serves to further block effective state response rather than facilitate it.

Florida’s Commissioner of Agriculture has stated that “such requirements are exceedingly cumbersome and of questionable benefit to the state.”

The authorization to “establish a requirement” is also a restrictive approach. In times of terrorist attack, government needs to be able to act quickly, not to be merely authorized to pass new laws or engage in the rulemaking process. In contrast, the emergency powers provision of the Safe Drinking Water Act provides that “upon receipt of information that a contaminant” is present drinking water or likely to enter drinking water and may present an imminent endangerment, the government is authorized to take such action as necessary to protect the public health.¹⁰

If a state, for instance, learned that a particular warehouse or truck was the subject of a bioterrorist attack and contained contaminated food, the new regulatory requirements under H.R. 4167 would make it extraordinarily difficult for the state to respond quickly and effectively. To take advantage of the imminent hazard authority, the state would have to first pass a law or promulgate a regulation to address the contamination (its existing law would have been preempted by the bill, unless it was identical to federal law), notify the federal government about the situation, and then wait to see if the federal government wanted to act. By the time these steps had been taken, the contaminated food could be dispersed through commerce. This is hardly a practical answer to a suspected bioterrorist threat or other emergency.

Further, imminent hazard authority is only available if the threat is likely to result in serious adverse health consequences or death. This is a high standard to meet in ordinary food safety situations, where, for example, food contamination is suspected but not confirmed. The imminent hazard authority is simply not an answer to most food safety problems a state or local government encounters every day.

⁹ Sec. 2, H.R. 4167, establishing sec. 403B(d), FFDCA.

¹⁰ Sec. 1431, Safe Drinking Water Act.

In response to serious concerns from the states regarding the impact of this legislation on their ability to respond to terrorist attacks, Rep. John D. Dingell wrote to the FDA to get their views.¹¹ FDA has never responded.

¹¹ Letter from Rep. John Dingell to Secretary Tommy Thompson, Department of Health and Human Services (Sept. 23, 2004).